SUPREME COURT, U. S.

AUG 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

Motion to Dismiss the Appeal and Affirm the Judgment and BRIEF OF APPELLEE

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

Fulton County Courthouse
Atlanta, Georgia 30303

INDEX

	Page
Motion to Dismiss or Affirm	1
Grounds of Motion to Dismiss	1
Grounds of Motion to Affirm	3
Appellant's Petition for Certiorari presents no substantial federal Question	4
QUESTIONS PRESENTED	4
REASONS FOR AFFIRMING THE JUDGMENT AND NOT GRANTING CERTIORARI	6
No constitutional protection for hard-core pornography	6
State may penalize possession for forbidden articles without violating constitution	7
Marchetti case did not render void the search warrant of Sept. 7, 1966	12
Many constitutional rulings held not to have retroactive effect	13
Seizure of articles illegally possessed tho' not described in warrant was proper	14
Marcus decision is distinguished from present case	16
Facts and circumstances authorized finding that Stanley had knowledge of obscene nature of the films	17
Proof showed community standards and the extreme obscene nature of these films	20
Conclusion	22

TABLE OF CASES

	Page
Aron v. U.S.	15
Austin and Gent	11
Cramp v. Board of Instruction	2
Crane v. Campbell, Sheriff	8
DiMarco v. Green	15
Gilbert v. California	14
Ginsberg v. New York	11, 12
Griffin v. California	13
Harris v. U.S.	9, 15
Jacobellis v. Ohio	7
Johnson v. New Jersey	14
Linkletter v. Walker	13
Mapp v. Ohio	13
Marchetti v. U.S.	4, 12
Marcus v. Search Warrants of Property	16
Miranda v. Arizona	14
People v. Crawford	9
People v. Saltis	9
Redrup v. New York	10
Roth v. State	6, 11
Saltis v. Illinois	9
Smith v. California	3, 6, 10, 17
State v. Todaro	8
Tehan v. Shott	14
Thompson v. U.S.	16
Todaro v. New Jersey	8
U.S. v. Eisner	16
U.S. v. Wade	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Under the authority of Rule 16 of the Supreme Court Appellee files this Motion to Dismiss the appeal, or, in the alternative, to affirm the judgment of the lower court. The decision of the court below, the Supreme Court of Georgia, is published in 224 Ga. 259 and in 161 S.E.2d, 309.

GROUNDS OF MOTION TO DISMISS

Appellee moves to dismiss the appeal upon the ground

that it does not present a substantial federal question, and on the ground that the judgment rests on an adequate non-federal basis. This is more particularly set forth as follows:

Appellant's contention that the Georgia Obscene Matter Statute "removes the element of scienter" is not well founded. The statute does not remove the element of scienter. The statute has been construed by the Supreme Court of Georgia in the decision in this case. Said decision interpreting the statute held that the statute did not withdraw the element of scienter. The decision said that the "contention" that the statute withdrew the element of scienter was "without merit". (4th division of Opinion)

The decision went on to say that the language upon which Appellant relies, towit: "if such person (an accused) reasonably should know of the obscene nature of such matter" merely amounts to a statutory expression of "a rule of evidence which has been extant in this State over many years." The decision pointed out that "whether a person has knowledge of a fact is a matter peculiarly within the mind and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof," and that all the surrounding circumstances may be shown as bearing upon the question whether the accused had knowledge of a certain thing or not.

In this appeal, the Georgia statute comes before the Court *as interpreted* by the Georgia Supreme Court. The authoritative interpretation by the State Supreme Court "puts these words in the statute as definitely as if it had been so amended by the Legislature." *Cramp v. Board of Instruction*, 368 U.S. 278, 82 S.Ct. 275 (5).

When it is considered that the Georgia statute does not eliminate the element of scienter, as construed by the Georgia court, then knowledge by the accused of the obscene nature of the literature or matter remains as a necessary element of the offense. The statute therefore does not come under the proscription of *Smith v. California*, 361 U.S. 147, which Appellant invokes.

Only the first of the "Questions Presented by the Appeal" presents a question which Appellant claims to authorize jurisdiction for this appeal. That is the Question in which Appellant contends that the Statute "removes the question of scienter." Since this first Question is not valid, and should fall, in the light of the Georgia Supreme Court's interpretation of the Statute, there is no proper basis for jurisdiction in this appeal.

GROUNDS OF MOTION TO AFFIRM

We make the motion to affirm the judgment of the lower court upon the ground that it is manifest that the questions on which the decision of this cause would depend are so unsubstantial as not to need further argument. If this Court were presented with an Obscene Matter Statute which did in fact withdraw the element of scienter, an entirely different question would be presented. But since in the present case the state statute retains the element of scienter, and only sets up a rule of evidence as to how scienter might be proved circumstantially, this appeal should be dismissed and the judgment of the lower court affirmed.

Since RULE 16 allows the appellee to present "any other grounds" as reasons why the MOTION TO AFFIRM should be granted, we suggest that the Court

consider at this point that this is a case of HARD-CORE PORNOGRAPHY, being a case of possession of three reels of motion picture films showing nude men and nude women engaging in acts of sodomy and sexual intercourse (for further description see the indictment and the evidence), the condition of said films showing that they were not newly made films but considerably used, and the possession being shown to be under such circumstances that the jury was authorized to find that some people were about to gather in defendant's house for the exhibition of these motion pictures, that a projection machine was in the home available for the projection of said pictures for viewing by such audience, and that the defendant knew of the obscene nature of said pictures.

APPELLANT'S PETITION FOR CERTIORARI PRESENTS NO SUBSTANTIAL ISSUE

We note that appellant's petition for appeal contains also the request that it be considered as a petition for certiorari, in the event it is dismissed as an appeal. On this phase of the case we make this Response and pray that the petition for writ of certiorari be denied, setting forth our reasons herein, with citations. We first give a summarized Response to the five Questions which Appellant says are presented:

QUESTIONS PRESENTED

1. Appellant's first question should have the last three lines stricken, since the Georgia statute does not remove the element of scienter. The Question then remains: Whether the Georgia Code section 26-6301, under which Appellant was convicted, is repugnant to the

First and 14th Amendments to the Constitution of the United States guaranteeing freedom of press and due process.

2. Question 2 might remain substantially as Appellant presents it. But it omits one important item for consideration, the time. The Question might be put this way: Whether *Marchetti v. U.S.*, decided January 29, 1968, rendered null and void a search warrant which had been issued September 7, 1966, for gambling material, wagering paraphernalia, etc.

3. This question can remain the same, but it is very indefinite and does not present any clear federal question as to validity or invalidity of the search warrant.

4. This is not a clear statement of a Question for decision. First, it says that the federal search warrant was "issued for failure to register as a gambler." This is an incorrect reference to the search warrant. It issued for the search of a 2-story residence for gambling material, wagering paraphernalia, and other described things. Next it merges two entirely separate questions into one clause of the statement, in the last two lines. It suggests a question whether officers executing a search warrant can ever seize an article of alleged contraband which was not described in the warrant. And it suggests a question as to whether a hard-core obscene motion picture film could ever be seized without a "prior adjudication" of obscenity. Both of these are "questions" but they are not necessarily federal questions when arising in a state trial for violation of a state statute.

5. Number 5 is not a proper Question. It includes an absolutely incorrect assumption, towit: ". . . where there is *no evidence* to show the appellant had prior

knowledge that they were obscene." This statement fails to recognize that there can be *circumstantial* evidence of any fact necessary to be proved in a criminal trial, and particularly in the area of knowledge and intent, where circumstantial evidence is recognized by the law as usually the only kind of evidence available.

REASONS FOR AFFIRMING THE JUDGMENT AND NOT GRANTING CERTIORARI

No Constitutional Protection For Hard-Core Pornography

Even though Appellant's contention that the Georgia statute eliminates scienter is not sound, his contention remains that the statute violates the constitutional provisions of freedom of speech and of the press. *Smith v. California*, 361 U.S. 147, upon which Appellant places so much reliance, dealt with a Los Angeles City Ordinance which in fact did remove the element of scienter from its obscene literature statute. One glance at the Los Angeles ordinance shows that scienter was eliminated. And for that reason the ordinance was held unconstitutional, as curtailing freedom of speech and press. Since the Georgia statute does not remove scienter, as we pointed out in our Motion to Dismiss or Affirm, the *Smith* case can give Appellant no benefit.

As held in *Roth v. United States*, 354 U.S. 476, obscenity is not within the area of constitutionally protected speech or press. The language of this decision indicates that the Court recognized that there may be considerable difference between one type of alleged obscene matter and other types. This difference in type, or difference in degree, was referred to by Mr. Justice Stew-

art in his concurring Opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, in which he said:

> "I have reached the conclusion, which I think is confirmed at least by negative implications in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography."

Justice Stewart did not attempt to define what would be hard-core pornography. But we are sure that the present case is an example of it. We challenge the imagination to produce more hard-core pornography than the motion pictures contained in the films in the present case!

They are in the evidence, for the Court to see, if the description in the Record is not sufficient.

Appellant's contention that the Georgia statute violates the constitutional provisions of freedom of speech and press, even as applied to such extreme pornographic matter as that in the present case, is not sound and should not be sustained.

State May Penalize Possession of Forbidden Articles Without Violating Constitution

Appellant criticizes the Georgia statute for penalizing what he terms the "mere possession" of these alleged obscene films. See his 5th Question, on page 3 of his Statement, and also his page 7 where he contends that the statute violates the First and the 14th Amendment.

There can be no doubt that the individual states have the constitutional power to pass legislation penalizing the *possession*, knowingly, of many things. Examples are:

Mere *possession* of stolen goods, with knowledge that they have been stolen, is made a crime in all jurisdictions that we know of. A New Jersey statute not only made possession of stolen goods a crime but provided that possession within a year from the date of the stealing would make a prima facie case, and "be deemed sufficient evidence to authorize conviction." This was held constitutional. *State v. Todaro,* 37 Atl.2d, 73 (1). Appeal was taken to the United States Supreme Court, 1944, where it was "dismissed since the application in this case of New Jersey's Rev. Stat., Tit.2, Ch.164, sec. 1, presents *no substantial federal question.*" *Todaro v. New Jersey,* 323 U.S. 667, 65 S.Ct. 73.

In *12 C.J. Secundum, page 753,* dissussing the crime of *possessing* burglarious tools, it is stated that "under some statutes the bare possession of such tools and implements is an offense irrespective of the intent, and under statutes of this character the tool or implement must be one peculiarly adapted to the commission of burglary in order to render its possession a crime." It is pointed out by the above text and notes thereunder that a jury may infer the defendant's intent to use the articles in committing crime from the nature of the articles and the circumstances under which possessed.

Some jurisdictions penalize the *possession* of intoxicating liquor, some penalize the *possession* of more than a certain amount of it, and some penalize the *possession* of apparatus for making it, commonly called whiskey stills, without a license. Long before prohibition became a national issue, it was settled that "a state may prohibit and punish the *possession* of intoxicating liquors." *Crane v. Campbell, Sheriff* (1917), 245 U.S. 304, 38 S.Ct. 98.

The *possession* of weapons is made a crime, under certain circumstances, varying considerably in different jurisdictions. The *possession* of a pistol concealed on one's person is frequently made a crime. In *People v. Saltis*, 328 Ill. 494, 160 N.E. 86, an Illinois statute was held constitutional which penalized the carrying of concealed weapons in one's possession, excepting police officers, wardens, etc., and there was an appeal taken to the United States Supreme Court where the appeal was "dismissed for want of jurisdiction in the Supreme Court for the reason that the federal questions sought to be presented are frivolous." *Saltis v. Illinois*, 277 U.S. 676, 48 S.Ct. 530. Even more stringent laws exist as to the possession of automatic weapons such as machine guns.

State laws generally penalize the mere *possession* of forged checks, notes, bills, etc., with knowledge that they have been forged. These laws are discussed in 37 C.J.S. page 60, under title Forgery.

The keeping or *possessing* of gaming tables or gambling paraphernalia, for the purpose of allowing games of chance to be played with them, is penalized in most of the states. This is discussed in 38 C.J.S. 154 et seq., under the title Gaming. And on page 158 it is pointed out that some states penalize the possession of slot-machines controlled by the deposit of a coin, without regard to whether the playing amounts to gambling. Several cases cited in the notes under above text refer to the purpose of penalizing the possession of gambling devices, for example, page 154 cites *People v. Crawford*, 25 N.Y.S.2d 259, as saying that the purpose of the legislation was "to combat an evil which constitutes not merely a form of gambling but a positive menace to every commu-

nity." (We feel that we can say that the possession of such hard-core pornographic motion picture films as in the present case constitutes a menace to the community in a very real sense, on a par with the keeping of gambling devices.)

The United States Government itself has many laws on the statute books penalizing the *possession* of various things, under various circumstances, for example: the possession of counterfeit currency, the possession of counterfeiting apparatus, the possession of blank cards of a draft board by one not entitled to such possession. As an example of the seizure of such illegally possessed draft cards, see *Harris v. State,* 331 U.S. 145, 67 S.Ct. 1098.

We cannot hope to list here all the instances in which valid laws are enacted penalizing *possession* of various things under various circumstances.

Our purpose in listing some such instances here is to point out that appellant's claim is unsound, when he contends that the Georgia obscenity statute violates the First and 14th Amendments of the U.S. Constitution merely because it penalizes the possession (knowingly) of pornographic films such as these.

It is true that the Supreme Court has held in *Smith v. California,* 361 U.S. 147, that the bookseller could not be penalized for having obscene material on his bookshelves, when he had no knowledge of the obscene nature of such material. That decision was limited to books, and the Court did not hold that a person could not be penalized if he *did have knowledge* of the obscene nature of the material.

We recognize that the Court held in *Redrup v. New*

York, 386 U.S. 767, and in the *Austin and Gent* cases, decided simultaneously, that the penalizing of the alleged obscene literature there set forth violated the Constitution. But the Court did not rule out all obscene literature prosecutions as being unconstitutional.

In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, a conviction was allowed to stand, involving as it did the sale of obscene literature to a minor, in violation of a New York statute. The Court reiterated the statement of the ROTH case, *supra*, that "obscenity is not within the area of protected speech or press."

In division II of the GINSBERG decision (page 1283 of 88 S.Ct. Reporter), it was pointed out that there was a "challenge to the *scienter* requirement of the statute, and that the challenge centers on the definition of 'knowingly' insofar as it includes 'reason to know' or 'a belief or ground for belief which warrants further inspection or inquiry or both.'" After discussing the alleged insufficient requirement of scienter, the GINSBERG decision refuses to hold that the element of *scienter* is insufficiently incorporated in the statute. The statute in question penalized the proscribed acts if "knowingly" made, and defined the word as follows:

> "(g) Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both."

The above is somewhat similar to the Georgia statute under consideration, which used the word "knowingly" and later in the statute used the words "if such person has knowledge or reasonably should know of the obscene nature of such matter," the latter words being held by

the Georgia Supreme Court to be merely a statutory expression of a rule of evidence.

Scienter remains an element of the Georgia statute, just as it was held to remain a requirement of the New York statute under consideration in the GINSBERG case. The Georgia statute passes the constitutional tests suggested in all of the foregoing cases, and should therefore be held not invalid for any reason upon which it is attached.

Marchetti Case did not Render Void the Search Warrant of Sept. 7, 1966

Under Question 2, as presented by Appellant, he contends that the case of *Marchetti v. U.S.*, 390 U.S. 39, 88 S.Ct. 697, which was decided January 29, 1968, rendered void the search warrant which had been issued by U.S. Commissioner Holden on September 7, 1966. We have read the MARCHETTI decision and find nothing in it which says or indicates that all search warrants issued for search of premises for gambling paraphernalia are void.

The holding was that in a federal prosecution for alleged evasion of payment of federal occupational tax on wagering and for failure to register and pay such tax, the "defendant's assertion of privilege against self-incrimination constituted a complete defense to the prosecution."

In the present case the accused Stanley presented no claim of self-incrimination at his trial. His present claim, in this regard, is merely an afterthought. The MARCHETTI case contained no holding that all persons in past convictions of whatever crimes, state or federal,

could have their convictions voided under this sort of contention. In the present case the contention is not valid, not based upon any previous contention or ruling in the prior history of the case.

The MARCHETTI case does not even hold that all *prospective* search warrants issued by federal magistrates for search and seizure of gambling paraphernalia would be void. It certainly does not hold that all *prior* search warrants issued by federal magistrates for search and seizure of gambling paraphernalia are void. The Court declared in MARCHETTI:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

In view of the above, it can hardly be maintained that the MARCHETTI decision rendered void all search warrants issued by federal magistrates for gambling paraphernalia, prospective and past.

Many Constitutional Rulings Held Not to Have Retroactive Effect

The United States Supreme Court has made many rulings on constitutional questions, especially in the realm of criminal prosecutions, that were declared to apply prospectively and not retrospectively.

In *Mapp v. Ohio*, 367 U.S. 643, the Supreme Court made an important new ruling in the realm of search and seizure, but held it was not retroactive in *Linkletter v. Walker*, 831 U.S. 618. In *Griffin v. California*, 380

U.S. 609, the Court made an important constitutional ruling on the prosecution's comment on a defendant's failure to testify, but in *Tehan v. Shott*, 382 US. 406, held it would not be applied retroactively. In *Miranda v. Arizona*, 384 U.S. 436, the Court established drastic new constitutional rules as to admissibility of confessions when a defendant had not been warned in certain respects, but in *Johnson v. New Jersey*, 384 U.S. 719, the Court held this ruling not to be retroactive. In *U.S. v. Wade*, 388 U.S. 218, the Court held that identification testimony based upon earlier identification of a prisoner in the absence of his lawyer would not be admissible, but in *Gilbert v. California*, 388 U.S. 263 held this ruling would not be applied retroactively.

Very forceful reasons were given in some of the above decisions as to why the rulings referred to would not be applied retroactively, including the "serious impact" and "serious disruption" that would follow the retroactive application of such rulings upon the administration of criminal laws. The same logic applies with great force in the present situation. For the reasons cited in the above decisions, we earnestly submit that the ruling in MARCHETTI should not be given retroactive application, and especially should not be held to render void a search warrant for gambling paraphernalia which had been issued by a U.S. Commissioner 16 months prior thereto.

Seizure of Articles Illegally Possessed Tho' Not Described in the Warrant Was Proper

Under Questions 3 and 4, Appellant contends that the seizure of the films was illegal because they were not

described in the search warrant. The Search & Seizure law of Georgia, Ga. Laws 1966, page 567, 569, says that when an officer is in the process of effecting a lawful search he is not limited to seizing the particular objects described in the search warrant, but may seize any object, thing or matter, the possession of which is unlawful, or any object, thing or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of Georgia.

This same legal principle has been upheld in federal cases. In *Harris v. U.S.*, 331 U.S. 145, 150, 67 S.Ct. 1098, some officers had arrested Harris in the living room of his home on a warrant charging mail fraud, and then began search of his apartment for certain documents which they believed would support the charge. In the course of that search they found something else, towit: some draft cards which were the property of the United States and had been stolen. The above decision held that "even though obtained by agents searching for evidence in connection with a different charge against the accused, the draft cards were not seized in violation of the Fourth Amendment against unreasonable searches and seizures.

The HARRIS case has been cited and followed in a number of other federal cases, among them being:

DiMarco v. Green, 385 F.2d 556 (5), 560, 5th Cir., 1967, upholding the seizure of burglary tools found in defendant's automobile upon his being lawfully arrested in the auto for a parole violation.

Aron v. U.S., 382 F.2d 965 (10, 11), 974, 8th Cir., 1967, upholding the seizure of stolen postage stamps

when the search warrant was for stolen U.S. Savings stamps.

Thompson v. U.S., 382 F.2d 390 (1, 3, 4) 9th Cir., 1967, upholding the seizure of unlawfully possessed marijuana, accidentally found in defendant's room by officer who had been voluntarily invited there.

U.S. v. Eisner, 297 F.2d 595 (7), certiorari denied, 369 U.S. 859, holding that an officer making a valid search under a search warrant could lawfully seize certain stolen articles (furs) although they were subject-matter of a different crime.

Marcus Decision Is Distinguished From the Present Case

On pages 14 to 16, appellant cites and relies upon *Marcus v. Search Warrants of Property*, 367 U.S. 717. In that case the ruling was far different from the question presented in this case. The MARCUS decision states, at its beginning: "This appeal presents the question whether due process under the 14th Amendment was denied the appellants by the application in this case of Missouri's procedures authorizing the search for and seizure of *allegedly obscene publications* preliminary to their destruction by burning or otherwise if found by a court to be obscene." No description of the publications was required by the statute and none was given in the search warrants. Under the search warrants the Missouri officers seized "approximately 11,000 copies of 280 publications." (Page 723) After being under seizure for two months, 180 of the publications were found by a court to be not obscene and ordered returned. (Pages 732-733)

The United States Supreme Court was greatly concerned over the curtailment of freedom of speech and of press as applied to those 180 publications which were withheld from the bookshelves for over two months, although not obscene and eventually ruled so by the court. The decision said that "Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression." (Page 738)

No analagous situation exists in the present case. Freedom of Speech or Press is not involved, under the ROTH case ruling that obscenity is not within the area of constitutionally protected speech or press. No such unconstitutional seizure of quantities of non-obscene matter took place, as in MARCUS.

Facts and Circumstances Authorized Finding That Stanley Had Knowledge of Obscene Nature of the Films

Question 5 is the one which makes an incorrect assumption that "there is no evidence to show the appellant had prior knowledge" that the films were obscene. While the State did not have "direct evidence" of what was in his mind, there were facts and circumstances shown which were sufficient to authorize the finding that he did have knowledge of the obscene nature of the films.

As said in *Smith v. California*, 361 U.S. 147, 154, "it has been some time now since the law viewed itself as impotent to explore the state of a man's mind," even in the absence of direct evidence. And in discussing the method of proof that a bookseller had knowledge of obscene matter in a book, the SMITH case said:

"The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Page 154)

Among the facts and circumstances which as a whole would authorize the finding that he had knowledge of the obscene nature of the films we might cite the following: (The pages listed are the page numbers at the bottom of the pages in the Georgia Supreme Court transcript of the evidence, which may be different from the new page numbers on the record sent up to the United States Supreme Court):

— The three motion picture films were found in a desk drawer in the master bedroom on the 2nd floor. (99, 111-112)

— This was the home of just one individual person, a bachelor, towit: Robert Eli Stanley. (86, 90, 101, 111)

— In a different room on the 2nd floor was a motion picture projection machine, which was used by the officers to view the films. (92, 100, 131)

— In the desk where the films were found were letters addressed to the defendant and stock brokerage forms with his name on them, and other papers bearing his name, these indicating his personal contact with the location. (101)

— There was also a motion picture screen up there in that second floor room. (103, 94-95)

— In the room where the films were found there was a closet in which were numerous suits, some of which had laundry marks with appellant's name on them. (101-102)

— Before leaving with the officers for police headquar-

ters, the defendant asked to get his coat, and went to the bedroom referred to and got his coat out of the closet there to go with them. (97)

— The three films found by the officers were badly scratched and dirty, and one of them had been rewound backwards, indicating that they were not in new condition and "obviously had been shown before." This was testified to by Officer Farr, who had been a professional photographer for 3 years and was familiar with films and projection machines. (131, 132)

— When the officers arrived, around 6:00 p.m., the dining room table was set for eight people; plates, knives and forks set in place; and in the kitchen was a large pan with about 2 dozen prepared uncooked biscuits covered by a cloth ready to go in the oven. (89, 91)

— After the officers arrived, several visitors arrived or came to the back door to enter, but were turned away; first was a lady, then a man, then two young ladies came to the back door to enter; they were well dressed people. (90-91)

— The three rolls of films showed "men and women, naked men and women having sexual relations, acts of perversion . . . acts of sodomy." (101)

It would be a reasonable conclusion or inference from all the facts and circumstances that the appellant put the films in this private and concealed location, where he had other documents and objects of a personal nature, because he had knowledge of the contents of the films and wanted to keep them within his own private control and have them available for display or use at such time as he chose to display them; that they had been previ-

ously displayed by him or in his presence, and that a group of people were about to gather at this private home of the appellant for a supper-party, with these obscene films available for showing to such persons for their entertainment within a few feet of where the supper-table was laid out for their repast!

Proof Showed Community Standards and the Extreme Obscene Nature of These Films

We should probably add, before closing, that the State showed by testimony in this trial that the predominant appeal of these films was to a "shameful and morbid interest in nudity and sex." This was shown by people who testified that they were familiar with the contemporary community standards with reference to morality and decency in Fulton County, and some in particular portions of Fulton County, and from that knowledge gave their opinion of these films as above set forth. Some testified that the films and their contents had "no redeeming social value" based on their described knowledge of such subject. One such witness was a police officer (page 116); one was a Gulf filling station proprietor (161); one was an attorney and prosecuting officer (168-169 et seq); one was a retired locomotive engineer (177 et seq); one was an optometrist with office at 864½ Hunter Street, S.W., doing business in that Southwest community of Atlanta, Fulton County, (183 et seq); one was a colored real estate dealer living at 1487 Mozley Drive, S.W., with offices at 905 Hunter Street, N.W. (192 et seq); another was an assistant solicitor general who had been engaged in contact with prosecuting work for over 30 years and residing in Fulton County. (200)

Another testifying to the above effect as to the nature of the three films, which he had viewed, was Dr. James P. Wesberry, Baptist pastor and chairman of the Georgia Literature Commission, who testified that during the 13 years he had been a member of that Commission he had had a great many occasions to examine and look at matter alleged to be obscene, and that from his knowledge of the contemporary community standards of decency he could say that the predominant appeal of these films was a shameful and morbid interest in nudity and sex, *extremely so* (138), that there is no redeeming social value or importance whatsoever in these films (139), and that they were the "most obnoxious, nauseating, sickening, foul and disgusting" that he had seen in his life. (140)

CONCLUSION

For the foregoing reasons, Appellee urges that this Court dismiss the appeal and affirm the judgment and deny the petition for certiorari in this case.

Respectfully submitted,

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

Fulton County Courthouse
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, including motions and brief, upon opposing counsel in this case, by mailing a copy of same to Hon. Wesley R. Asinof, counsel for appellant, at his office, 3424 First National Bank Building, Atlanta, Georgia 30303.

This August 2, 1968.

J. WALTER LECRAW
Of Counsel for Appellee